

**IN THE HIGH COURT OF TANZANIA  
(DAR ES SALAAM SUB DISTRICT REGISTRY)**

**AT DAR ES SALAAM**

**CIVIL APPEAL NO. 267 OF 2021**

(Arising from Judgment and Decree of the District Court of Kinondoni at Kinondoni

Dated 2<sup>nd</sup> July, 2021 before Hon. F.L.Moshi-PRM in Civil Case No.194 of 2019)

**PM GROUP (T) LIMITED..... APPELLANT**

**VERSUS**

**AC TECHNOLOGY LIMITED..... RESPONDENT**

**JUDGMENT**

Date of last Order: 17/05/2023

Date of judgment 09/06/2023

**E.E. KAKOLAKI, J.**

This appeal by PM Group (T) Limited arises from the decision of the District Court of Kinondoni in Civil Case 194 of 2019, whereas the appellant was ordered to pay the respondent among others reliefs a total sum of Tsh.133,697,310.80/= as the outstanding principal amount arising from breach of contract by the appellant for failure to make payments for the work done by the respondent as per the contract. For a better appreciation of what transpired, I find it pertinent to narrate albeit briefly the fact that gave rise to this appeal. As per records, the respondent was subcontracted by the

appellant for execution of works of HVAC installation (Air Conditioning and Mechanical Installation) at CITI BANK TANZANIA head quarter in Dar es Salaam the work which respondent alleged she diligently and persistently performed as per the contract and commissioned it to the appellant. It appears the appellant paid the agreed consideration in ten installments remaining with the outstanding balance of Tshs. Tsh.133,697,310.80/= which was never paid. Thus, the respondent filed Civil Case No.194 of 2019 before the District Court of Kinondoni claiming among other things payment of the above stated outstanding amount.

After both parties were heard in merit and the trial court adjudged in favour of the respondent and ordered the appellant to pay Tsh.133,697,310.80 as outstanding principal amount, interest at court rate, general damages to the tune of 10,000,000/= plus costs of the suit. It is the said decision that triggered the appellant to file the instant appeal fronting five (5) grounds of grievances going thus:

- 1. That the learned trial Magistrate erred in law and fact in wrongly awarding reliefs to the respondent without putting on board the requirement of re-measurement*

- 2. That the learned trial Magistrate erred in law and fact for not making a proper analysis of the evidence, hence occasioned to miscarriage of justice.*
- 3. That the learned trial Magistrate erred in law and fact in deciding the case, in absent of a board resolution authorizing the plaintiff to institute a case.*
- 4. That the learned trial Magistrate erred in law and fact in awarding the respondent the sum of Tsh. 133,697,310.80 as outstanding principal amount, general damages to the tune of Tsh. 10,000,000/= interest ad costs there to in absence of the clear evidence on the existence of the company, therefore awarded redress to a ghost company.*
- 5. That the learned trial Magistrate erred in law and fact in appreciating the weak and poor evidence tendered by the respondent.*

It is on the basis of the above grounds that appellant invited the court to allow the appeal, quash the Judgment of the District Court, order the respondent to pay cost of this appeal and any other reliefs this court deems fit and just to grant.

Hearing of the appeal took the form of oral submission where by the appellant was represented by Mr. Ludovick Nickson while respondent had the services of Mr. Elias Kisamo, both learned advocates.

From the outset, in his submission, Mr. Nickson intimated to the court that, he wishes to consolidate grounds No. 1, 2, 4 and 5 and argue them conjunctively. On his side, Mr. Kisamo responded to the grounds as submitted by the appellant counsel. However, in determining this appeal, I am proposing to start with the third ground of appeal, in which in my profound view if well addressed, it has the effect of disposing off the appeal.

In the third ground of appeal Mr. Nickson submitted that, the suit before the trial court was incompetent and ought to be struck out because it lacked the board resolution authorizing the respondent to institute it before the trial court. He contended that, such act offended the provisions of section 147 (1) of the Companies Act, No. 12 of 2002 and the precedent set by the Court of Appeal in the case of **Ursino Palms Estate Limited Vs. Kyela Valley Foods Ltd and Others**, Civil Application No. 28 of 2014 at page 4 and 5 that, when the company authorizes commencement of the legal proceedings a resolution of company or board of directors meeting duly recorded in minutes must be passed. To buttresses his position, he cited to the Court

the case of **Boimanda Morden Construction Co. Ltd Vs. Tenende Mwakagile and Others**, Land Case No. 8 of 2022 at page 6, in which it was insisted that, before commencement of the legal proceedings by the company a board resolution or resolutions have to be passed, and that fact has to be pleaded in the plaint. He argued that, in the matter at consideration there is nowhere in the plaint the board resolution was pleaded nor was it produced as evidence in court. He took the view that, the omission rendered the plaint incompetent before the trial court and therefore it was improper for the trial court to entertain it. It is on the basis of the above submission that Mr. Nickson prayed this Court to allow the appeal, quash and set aside the trial judgment with cost.

In response to this ground Mr. Kisamo contended that, the point is a matter of fact and was not raised during trial and that, the position as to whether it affects the jurisdiction of the court or not, is not well settled even by the court of appeal itself. He was of the view that, since the appellant did not raise it during trial, he is barred from raising it now. He argued further that, parties are bound by their pleadings, the complained off board resolution is accompanied as part of the pleadings, so the law was complied with. Mr Kisamo however, invited the Court to be guided by the overriding objectives

principle to hold that, since that document constituted part of the pleadings, any complaint arising out of it now be considered as afterthought and rejected. He then prayed for the dismissal of appeal for want of merit.

In a short rejoinder Mr. Nickson attacked Mr. Kisamo's submission that, the matter of board resolution is a matter of fact. He was of the firm stand that, the requirement of board resolution before any suit is preferred by the company is the point of law and not fact, and that, such point of law affects the jurisdiction of the court and therefore can be raised at any time. Concerning the contention that the said board resolution was annexed to the plaint and therefore in compliance of the law, it was Mr. Nickson's arguments that, the case law cited by the appellant requires the board resolution to be pleaded in the plaint, but in our case the same was not pleaded, thus this Court has no reason to believe that, the same formed part of the proceedings. He was of the view that the same had to be admitted to form part of the proceedings failure of which rendered the suit incompetent, hence the trial court had no jurisdiction to entertain the matter. He then reiterated his submission in chief.

I have keenly considered the submission advanced by the learned counsels for the parties concerning this ground and traversed through lower courts

records. The main issue for determination by this Court is whether the suit before the trial court was incompetent for want of board resolution by the respondent.

I wish to state from the outset that, I do not subscribe to Mr. Kisamo's submission that, the issue of board resolution is a matter of fact. The law is very clear under section 147 (1) (a) and (b) of the Companies Act No 12 of 2002, that anything in the company that may be done by resolution of the company in general meeting or by resolution of a meeting of any class of members of the company, must be so done by resolution in writing duly signed by members of the company. The object of such mandatory requirement of board resolution no doubt is to protect interest of shareholders and or other directors in the company from unilateral decisions or acts of an individual person. This Court had an opportunity to discuss and affirm that stance in the case of **Oxley Limited Vs. Nyarusu Mining Company Limited and Another (supra)**, where Court had this to say:

*"It has been held by this court that the gist of the above provision is to ensure that company's affairs are run and managed by board of directors to avoid unilateral decisions or acts of an individual person which might be detrimental to the company and other shareholders. **As such, the requirement***

***for board resolution before institution of the case is intended to safeguard the interest of shareholders who may be bound by the decision of the court of which they were not aware.”*** (Emphasis supplied).

Guided with the object of the provision of section 147 of Companies Act as adumbrated above, I hold the view that, as the law stands now, any decision of the company to institute civil action must be sanctioned by the company board resolution in writing before the suit is filed in Court. I find comfort on this legal stance in a number of cases including the case of **Bugerere Coffee Growers Ltd Vs. Sebaduka and Another** [1970] 1 EA 147, **Ursino Palms Estate Limited Vs. Kyela Valley Foods Limited & Others** (supra), **Oxley Limited Vs. Nyarusu Mining Company Limited and Another**, Commercial Case No. 14 of 2022 HC-unreported), **Lwempisi General Company Limited and Another Vs. Richard Kweyamba Joseph Rugarabamu**, Commercial Case No 6 of 2022 (Hc-unreported) and **Boimanda Modern Construction Co. Ltd Vs. Tende Mwakagile and Others** (supra). In view of the above therefore, any violation of section 147 of the Companies Act as demonstrated in the above cited cases, renders the suit incompetent before the court, the incompetence which suffers it the risk of being struck out. As incompetence of the suit affects jurisdiction of



the court, I embrace Mr. Nickson's submission that, it can be raised at any time.

The remaining question to be answered is whether there was compliance of section 147 of Companies Act by the respondent. As alluded to above, when the company institutes the suit, proof of formal authority sanctioning its decision to sue duly issued by board of directors must be disclosed in the pleadings, meaning that, that fact must be averred and the minutes of board resolution annexed to the plaint and tendered in Court.

In this appeal, it is learnt from Mr. Kisamo's submission that, since the board resolution was annexed to the plaint though not pleaded, then this Court can invoke overriding objectives principle to hold that the same formed party of the proceedings and thus the legal requirement was met. I am inclined not to embrace Mr. Kisamo's preposition due to the following reasons; **firstly** that, it is trite law that, the fact that a board resolution was passed by the board of directors must be pleaded in the plaint as correctly stated by this Court in the case of **Boimanda Modern Construction Co. Ltd** (supra). Similar stance was outlined in the case of **St. Benard's Hospital Company Limited Vs. Dr. Linus Maemba Mlula Chuwa**, Commercial Case No 57 of 2004 (HC- unreported) where the Court echoed:

*"Having carefully considered the matter, I have reached a settled conclusion that, **indeed the pleadings (plaint) should expressly reflect that there is resolution authorizing the filing of an action.** A company which does not do so in its pleadings, risks itself to the dangers of being faced by any insurmountable preliminary objection as is the one at hand..."* (Emphasis supplied).

I had time to peruse the respondent's plaint and satisfied myself that, there is no single paragraph therein that pleaded existence of company board resolution passed by the board of directors of the respondent before institution of the suit. **Secondly;** as correctly submitted by Mr. Nickson, despite of being annexed without being pleaded the said minutes of board resolution was never tendered in court so as to form part of the proceedings. It is therefore my finding that, in filing the suit before the trial court, the respondent infringed the provisions of section 147 (1) of the companies Act. The issue is thus answered in affirmative that, the suit before the trial court was incompetent for want of board resolution by the respondent. This ground has the effect of disposing of the appeal and therefore I find no reason to labour on the rest of the grounds of appeal.

As the suit before the trial court was incompetent, their respective proceedings and judgment were rendered null and void. I therefore proceed

to quash proceedings and set aside the judgment. The appeal is therefore allowed with costs.

It is so ordered.

DATED at Dar es salaam this 09<sup>th</sup> June, 2023.



E. E. KAKOLAKI

**JUDGE**

09/06/2023.

The Judgment has been delivered at Dar es Salaam today 09<sup>th</sup> day of June, 2023 in the presence of Mr. Emmanuel Ndaga, advocate for the respondent who is also holding brief for advocate Nickson Ludovick for the appellant, and Ms. Asha Livanga, Court clerk.

Right of Appeal explained.



E. E. KAKOLAKI

**JUDGE**

09/06/2023.

